Supreme Court, U. S.
FILED
SEP 30 1977
MICHAEL RODAK, JR., CLERK

No. 76-1058

In the

Supreme Court of the United States

OCTOBER TERM, 1976

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

SHARON L. KING
One First National Plaza
Suite 4200
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:
ROBERT E. CRONIN
GERALD D. MINDELL
THOMAS G. RYAN
PHILIP P. STEPTOE
ISHAM, LINCOLN & BEALE

The Schaffer Press, Inc.—(312) 263-6969

INDEX

PAGE

ARGUMENT 1

I. The Government's Argument That Any Benefit Arising From The Employment Relationship Constitutes A "Wage" Is Premised on Basic Fallacies 1

A. Reimbursements For Travel Expenses Long Have Been Excluded From "Wages" Because Not "For Services Performed" 2

B. Not Every Item of Economic Benefit Represents A "Wage" 6

II. The Government's Concession That Withholding May Not Be Retroactively Imposed Where Justified By A Factual Or Legal Basis Requires A Decision For Petitioner 12

A. In 1963, Long-Standing Treasury Regulations Explicitly Stated That Reimbursements For Travel Expenses Were Not "Wages" 13

B. Judicial Authority In 1963 Held That Employees Were Entitled To An Offsetting Income Tax Deduction 14

C. Employers Have A Right To Be Told In Advance Of Any Changes In Long-Standing Withholding Policy 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES:

Acacia Mutual Life Insurance Co. v. United States, 272 F.Supp. 188 (D. Md. 1967) 9

PAGE

Allstate Insurance Co. v. United States, 530 F.2d 378 (Ct. Cl. 1976) 9

Ahrens v. United States, 264 F.Supp. 518 (S.D. Ill. 1976) 14

Chandler v. Commissioner, 226 F.2d 407 (1st Cir. 1955) 14

Commissioner v. LoBue, 351 U.S. 243 (1956) 8

Correll v. United States, 369 F.2d 86 (6th Cir. 1966) .. 14

Hanson v. Commissioner, 298 F.2d 391 (8th Cir. 1962) 14

Humble Oil & Refining Co. v. United States, 442 F. 2d 1363 (Ct. Cl. 1971) 9, 10

Humble Pipe Line Co. v. United States, 442 F.2d 1353 (Ct. Cl. 1971) 9

Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929) 8

Peoples Life Insurance Co. v. United States, 373 F. 2d 924 (Ct. Cl. 1967) 9

Ritter v. United States, 393 F.2d 823 (Ct. Cl. 1968) 9

Scott v. Kelm, 110 F.Supp. 819 (D. Minn. 1953) 14

Stubbs, Overbeck & Associates, Inc. v. United States, 445 F.2d 1142 (5th Cir. 1971) 10, 11

United States v. Correll, 389 U.S. 299 (1967) 14

William A. Bagley, 46 T.C. 176 (1966) 14

STATUTES AND REGULATIONS:

Internal Revenue Code of 1954, as amended (26 U.S.C.):

Section 61 7

Section 82 10

Section 3401 1

42 U.S.C. §1988 (1976) 16

PAGE

Treasury Regulations on Income Tax (26 C.F.R.):

Section 1.119-1(a)(2)(i) 7

Section 31.3401(a)-1(b)(2) 2, 13

MISCELLANEOUS:

Daily Tax Rep. (BNA), No. 169 at G-6 (August 30, 1977) 8

O.D. 514, 2 Cum. Bull. 90 (1920) 7

Office of the Ass't Sec'y for Tax Policy, Summary and Discussion Draft of Proposed Regulations on Fringe Benefits, Daily Tax Rep. (BNA), No. 172 at J-7 (September 4, 1976) 7

Rev. Rul. 55-520, 1955-2 Cum. Bull. 393 4

Rev. Rul. 56-249, 1956-1 Cum. Bull. 488 4

Rev. Rul. 58-301, 1958-1 Cum. Bull. 23 4

Rev. Rul. 58-145, 1958-1 Cum. Bull. 360 4

Rev. Rul. 59-227, 1959-2 Cum. Bull. 13 4

Rev. Rul. 69-592, 1969-2 Cum. Bull. 193 12

Statements of the Chairman and ranking member of the Senate Finance Committee for the Tax Reform Act of 1976, R. Rep. No. 1236, 94th Cong., 2d Sess. 489, reprinted in 1976-3, Cum. Bull. 807, 893 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1058

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I.

THE GOVERNMENT'S ARGUMENT THAT ANY BENEFIT ARISING FROM THE EMPLOYMENT RELATIONSHIP CONSTITUTES A "WAGE" IS PREMISED ON BASIC FALLACIES

The Internal Revenue Code ("the Code") limits the term "wages" for withholding tax purposes to "remuneration . . . for services performed." Section 3401(a). The intent of Congress to confine the scope of employers' with-

holding obligations long has been reflected in administrative practice and the established principle that reimbursements made to employees for legitimate expenses incurred in travel for the employer's business are not "wages" subject to withholding.

The government now urges upon this Court a sweeping definition:

> The statutory concept of "wages" is not tied to the performance of any particular service, but includes any personal economic benefit given by an employer to his employee as a result of the employment relationship.

Gov't. Br. 20.[1] Acceptance of the government's view, however, requires a departure not only from the definition codified by Congress but from administrative practice and judicial precedent as well. The government's proposed definition is premised upon two erroneous assumptions: (1) that every economic benefit to an employee represents "income" and (2) that every item of income represents a "wage" for withholding purposes.

A. Reimbursements For Travel Expenses Long Have Been Excluded From "Wages" Because Not "For Services Performed"

Both courts below specifically acknowledged that the reimbursements involved here were legitimate expenses incurred by employees for travel on behalf of the Petitioner ("the Company") (App. 16, 22). Treasury Regulations §31.3401(a)-1(b)(2)—which traces back to 1943 and

[1] References herein to "Gov't. Br." are to the Brief for the United States. "Br." refers to the Brief for the Petitioner.

the inception of the present withholding system—provides in pertinent part:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding.

The government attempts to discredit this regulation through a strained construction of its terms and through complete disregard of the underlying rationale for the regulation—*i.e.*, that noncompensatory payments primarily for the business of the employer are not, and never have been, wages.

The government maintains that the regulation excludes from "wages" only payments with respect to which the recipient is entitled to an offsetting business expense deduction. Gov't. Br. 26. In support of this contention, the government argues that the phrase "ordinary and necessary" is a statutory term of art that refers to the deductible expenses under Section 162 (a) of the Code. It then concludes that the deduction which the regulation contemplates is that of the employee and not that of the employer.[2]

The government's strained interpretation is repudiated by the express language of the regulation. The emphasis is upon "amounts *paid*," not amounts received, and upon "ordinary and necessary expenses incurred . . . in the business of *the employer*," rather than deductibility to the employee (emphasis supplied). Indeed, the ability of an em-

[2] Here, the government has not challenged, nor could it challenge, the right of the Company to deduct as "ordinary and necessary" business expenses what both courts below recognized to be legitimate travel expenses.

ployee to obtain an offsetting business deduction is wholly irrelevant to the application of the regulation, which determines only the *employer's* obligation.

Moreover, the government's interpretation of the regulation is inconsistent with its own rulings holding that various payments representing nondeductible income to an employee do not constitute "wages." *See* Rev. Rul. 55-520, 1955-2 Cum. Bull. 393; Rev. Rul. 56-249, 1956-1 Cum. Bull. 488; Rev. Rul, 58-301, 1958-1 Cum. Bull. 23; Rev. Rul. 58-145, 1958-1 Cum. Bull. 360; Rev. Rul. 59-227, 1959-2 Cum. Bull. 13.[3]

Any reasonable reading of this regulation would reveal that withholding is not required with respect to any reimbursements for legitimate travel expenses. The regulation obviously makes no attempt to distinguish between overnight and nonovernight trips. The government nevertheless contends that its "overnight rule," denying *employees* an *income* tax deduction for travel reimbursements, should now control the withholding tax obligations of employers. Gov't Br. 25-26. But the "overnight rule," which the government says has been outstanding since 1940, was not incorporated—or even reflected in any way—in the withholding regulations adopted only three years later.

[3] The government attempts to distinguish these rulings by claiming that each involved a payment which somehow was made outside of the employment relationship—such as before it began, after it terminated or in exchange for its termination. The government does not explain how this argument coincides with its earlier argument that "a continuing employment relationship is not a prerequisite" for treating a payment as a "wage." *Compare* Gov't. Br. 29 n.14 *with* Gov't. Br. 19. In any event, the government's position is clear: it is asking this Court to overlook the government's long-established rulings.

The government, in its efforts to bootstrap a rule addressed to employees' income tax treatment into a withholding requirement for employers, fails to answer the ultimate question of how an item which is a non-wage item when a trip is for overnight is somehow converted into a "wage" when a legitimate business trip is for a lesser period. Certainly expenses incurred on nonovernight trips are no less legitimate travel expenses to the Company than those incurred on overnight trips and have no different effect to the employees.[4] In this case, the exact same amount of meal reimbursement was paid to employees whether traveling on overnight or nonovernight trips for the employer (App. 16, 22; Tr. 24-29, 37). As the Fifth Circuit observed in *Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F.2d

[4] It is questionable whether employees of the Company received any economic benefit due to the meal reimbursement policy. When not traveling on behalf of the Company, most employees ate lunch at home at a cost likely to be less than the difference, for example, between $1.40 and the actual cost of purchasing a meal when traveling. *See also* the opinion of the district court below, wherein it is remarked:

> The evidence disclosed that depending on the individual and the circumstances the $1.40 rate was sometimes in excess of the actual lunch cost, but very often it was insufficient to cover the cost. . . . Even in 1963 the $1.40 rate was modest considering that many of these employees were men engaged in open air labor. As a practical matter, it could hardly be considered a money making proposition for an employee.

App. 16-17. Further, a benefit is not always conferred upon a traveling employee through reimbursement of meal expenses when it is noted that the meal often is consumed under varying circumstances at unfamiliar facilities of questionable quality.

1142, 1147 (5th Cir. 1971): "The payments are either wages or not from beginning to end, assuming there is no change in the factual situation other than the passage of time."[5]

B. Not Every Economic Benefit Represents A "Wage"

The expansive definition of "wages" advanced by the government would tie the term to any economic benefit

[5] Apparently recognizing this weakness in its argument, the government also has attempted to summarize the facts in this case so that the reimbursements appear more like "remuneration" than merely travel expense payments. Thus, the government states or suggests that the amount of the reimbursements: (i) varied according to an employee's seniority status (Gov't. Br. 3, 21-22 n.9); (ii) were not distinguished on an employee's paycheck from salary (Gov't. Br. 4); (iii) comprised an appreciable part of an employee's total remuneration (Gov't. Br. 19 n.7, 33); (iv) were not audited with respect to non-union employees (Gov't. Br. 3); and (v) were received in "many" cases when employees carried their lunch (Gov't. Br. 4). These simply are not the facts, as the government well knows or should know from the record. As the record shows, there was no correlation between seniority or rate of pay and amount of reimbursement (App. 17; Tr. 29-30; 44-45); the reimbursements were not, and could not have been, an appreciable part of an employee's remuneration because they were so small (App. 16-17); all employees were required to comply with accounting procedures of the Company, which were carefully supervised, in order to obtain meal reimbursements (App. 16; Tr. 32-38, 64-66); the reimbursement amount was specifically identified as travel expense upon payment to the employee (Tr. 39-40; Plaintiff's Ex. 11); employees rarely carried their lunch and then only for the convenience of the Company (Tr. 94, 113, 117, 124, 128, 135, 140-41).

somehow attributable to the employment relationship. However, the notion of "economic benefit" has never served as a suitable explanation of "income," much less "wages." The Department of the Treasury has remarked:

> It is sometimes asserted simply that income includes any "economic benefit" received. . . . But the concept of "economic benefit" does not explain 60 years of actual experience.

Office of the Ass't Sec'y for Tax Policy, Summary and Discussion Draft of Proposed IRS Regulations on Employee Fringe Benefits, Daily Tax Report (BNA), No. 172 at J-7 (September 4, 1975).[6]

Indeed, "actual experience" demonstrates that economic benefit is not the determinative feature of income. As early as 1920, in an unrevoked Official Decision of the Internal Revenue Service, it was recognized that "supper money" provided to employees by their employers did not represent taxable income to the employees, as long as it was provided "for the convenience of the employer." O.D. 514, 2 Cum. Bull. 90 (1920). *See also* Treasury Regulations §1.119-1(a)(2)(i). In like manner, facilities and privileges, either to accommodate business requirements or to pro-

[6] The Department of the Treasury also noted:

> The Internal Revenue Code states simply that gross income means all income from whatever source derived. . . . [Section 61] As a definition, that language has an obvious defect, for to say that gross income includes income still fails to tell us what income is. The statutory language should be viewed rather as broad authorization to reach such items as may be appropriate, in the context of our overall system. It is clearly broad enough to encompass almost any economic benefit, but it is equally clear that it has not been construed to do so. . . . [M]ost of the hundreds of pages of the Internal Revenue Code were written to help draw the lines between what will and what will not be treated as income.

mote good will (*e.g.*, courtesy discounts) do not result in gross income to employees.[7]

Proceeding from the erroneous assumption that economic benefit is the hallmark of income, the government maintains that there is a general "equivalence" between income and wages in the employment context. *See, e.g.*, Gov't. Br. 15, 21 n.8. This over-simplified equation may appear seductive but it represents a marked departure from settled practice and is without logical basis. Neither administrative practice of the Internal Revenue Service nor judicial determination support the government's contention. Further, even the government retreats from a pure equivalence theory and suggests that an item of travel reimbursement to an employee becomes a "wage" only in the absence of an offsetting deduction to the employee. Gov't. Br. 25 *et seq.*

The government's rulings long have recognized the fundamental distinction between an employee's income and an

[7] Any relationship between economic benefit and income is exceedingly difficult to define. The government itself has been unable to articulate tax standards with respect to employee fringe benefits. *See* Br. 23 n.17. As recently as August 30, 1977, the Internal Revenue Service indicated that no decision had been made on which fringe benefits, not currently taxed, should be treated as income to employees. *See* Daily Tax Rep. (BNA), No. 169 at G-6. This Court has on occasion considered the meaning of "gross income" in specific contexts. *See, e.g., Commissioner* v. *Lobue*, 351, 243 (1956); *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716 (1929). However, it has never been considered, contrary to the government's apparent suggestion (Gov't. Br. 17-18, 21 n.8), that this Court was undertaking the impossible task of defining the concept for all circumstances. Further, in such "income" cases this Court was never asked to focus on the issue of whether *all* gross income received in the employment context constituted "remuneration . . . for services performed" and thus "wages" for withholding purposes.

employer's withholding obligation. *See generally* discussion in Br. 14-15. In its rulings, the government specifically holds that not every payment by an employer which is nondeductible income to an employee is a "wage" subject to withholding. *See, supra*, note 3 and accompanying text.

A settled line of judicial precedent also has recognized the distinction. The government attempts to dismiss the cases, stating:

> Once it is recognized that the meal allowances are includable in the employees' gross income and not deductible by them as business expenses, the lower court opinions upon which petitioner relies (Br. 15-16) are distinguishable.

Gov't. Br. 27. But each case expressly states that the income tax consequence to an employee is irrelevant to the issue of whether the employer must treat the reimbursements as "wages" for withholding purposes.[8]

In the *Humble* cases and *Allstate*, the Court of Claims held that payments or reimbursements by an employer of its existing employees' "indirect" moving expenses were not "wages," notwithstanding its prior ruling in *Ritter* v. *United States*, 393 F.2d 823 (1968), that such payments were nondeductible income to the employees.[9]

[8] *See, e.g., Peoples Life Insurance Co.* v. *United States*, 373 F.2d 924, 932-33 (Ct. Cl. 1967); *Acacia Mutual Life Insurance Co.* v. *United States*, 272 F.Supp. 188, 194-95 (D. Md. 1967); *Humble Pipe Line Co.* v. *United States*, 442 F.2d 1353, 1356 (Ct. Cl. 1971); *Humble Oil & Refining Co.* v. *United States*, 442 F.2d 1363, 1365-67 (Ct. Cl. 1971). *See also Allstate Insurance Co.* v. *United States*, 530 F.2d 378, 383 Ct. Cl. 1976).

[9] The government mistakenly asserts that the Court of Claims held in *Humble Oil* that such payments were not taxable income to existing employees. Gov't. Br. 29 n.14. The passage in *Humble Oil* which the government has mis-

The issues in the *Humble* cases and *Allstate* are precisely the same as in this case, *i.e.*, whether payments made by employers to employees for bona fide business reasons unrelated to their compensation are "wages," even if such payments are taxable income to employees.[10]

The government is also mistaken in its treatment of *Stubbs, Overbeck & Associates, Inc.* v. *United States,* 445 F.2d 1142 (5th Cir. 1971), in which the court held that per diem payments made by an employer as a personal living allowance to employees located at a remote job site did not constitute "wages." The government attempts to characterize the *Stubbs* decision as "turn[ing] upon the fact that the employee's assignment was away from home overnight, so that his expenses were deductible." Gov't. Br. 28 n.12. But the Fifth

---

[9] (Continued)
read points out that, while revenue rulings existing at the time for withholding would have informed the employer that reimbursements of "indirect" moving expenses constituted nondeductible income to both new and existing employees, such rulings required *withholding* only with respect to *new* employees. *See* 442 F.2d at 1369-70. Thus, *Humble Oil* also confirms that the government has an obligation to give employers reasonable advance notice of withholding requirements. *See, infra,* pp. 14-15.

[10] Congress eventually dealt with moving expense reimbursements through precise and specific legislation, rather than by engaging in drastic overhaul of the entire withholding system as the government urged upon the Court of Claims then and urges upon this Court today. Congress specified in Section 82 of the Code that employer reimbursements for moving expenses should be treated not only as gross income but specifically as "compensation for services." This provision would be unnecessary if, as the government suggests, all items of gross income are "wages."

Circuit did not mention or allude to the overnight rule, a concept having application to employees, in its determination of an employer's withholding responsibility. There is no reason to suppose that the *Stubbs* court did not mean what it said in concluding that the deductibility of such allowances by employees was "immaterial" to its decision because "we are not concerned with what constitutes taxable income to the employee."[11] 445 F.2d at 1149.

The government's departure from established practice would not only tie the term "wages" to a protean concept capable of embracing whatever the government sees fit but could lead to the further absurdity of requiring employers to look to the deductions of individual employees in determining withholding obligations. *See* Gov't. Br. 13-14, 26. The government opines that "an employer surely can estimate whether the reimbursements provided to his employees can reasonably be expected to exceed his actual expenses." Gov't. Br. 26 n.10. But forcing an employer, such as the Company, with thousands of employees to make such estimates with respect to *each* employee and *each* kind of expense allowance for *each* payment period before any reimbursements are issued would be an administrative nightmare.

Acceptance of the government's view of "wages" would work a fundamental revision of employers' withholding obligations and would effect a radical overhaul of the withholding system. The government is in effect seeking judicial legislation from this Court.

---

[11] A significant point made by the *Stubbs* court, and ignored by the government, is that "[a]n employee may receive *economic benefits* from his employer that are not subject to the withholding provisions of the Code" (emphasis supplied). 445 F.2d at 1149.

II.

THE GOVERNMENT'S CONCESSION THAT WITHHOLDING SHOULD NOT BE REQUIRED RETROACTIVELY IF A FACTUAL OR LEGAL BASIS JUSTIFIES NOT WITHHOLDING REQUIRES A DECISION FOR PETITIONER

In the Company's opening brief, it is argued that the government's attempt in this case to apply withholding requirements retroactively is an abuse of discretion. It was noted that Congress condemns such retroactive enforcement because it "creates havoc" in the withholding system. Br. 25-32. Moreover, it is fundamentally unfair to require employers to pay their employees' taxes merely because, at the time for withholding, they failed to predict future changes in the tax laws.

The government's response is a conclusory assertion:

> In the absence of any factual or legal basis upon which petitioner could have concluded that its meal allowances were not subject to withholding, the Commission's assessment of unpaid taxes does not work any unfairness upon it and is not an impermissible abuse of discretion.

Gov't. Br. 35. Thus, the government concedes, as it must, that if, in 1963, the Company did not withhold on travel expense reimbursements because there was a factual or legal basis for not withholding, retroactive enforcement of withholding rules would be an abuse of discretion. *See* Rev. Rul. 69-592, 1969-2 Cum. Bull. 193. The government's contention that the Company could not have concluded in 1963 that any such factual or legal basis existed is without support.

A. In 1963, Long-Standing Treasury Regulations Explicitly Stated That Reimbursements For Travel Expenses Were Not "Wages"

In 1963, Treasury Regulations § 31.3401(a)-1(b)(2) provided, as it does today, that amounts paid for traveling or other bona fide ordinary and necessary expenses incurred in the business of the employer are not wages and are not subject to withholding. Both courts below found that the noon meal reimbursements in this case were for legitimate travel expenses (App. 16, 22). Under the circumstances, no employer could reasonably have suspected that any withholding requirement existed.

The government contends that the Company should have known that this regulation was not applicable because its "overnight rule," which denies *income* tax deductions to employees, had been announced in 1940. Gov't. Br. 32-33. However, the government does not explain how the "overnight rule" could have application to an employer's withholding obligation. Neither does it explain why, if the "overnight rule" was relevant to withholding, the government did not notify employers of this fact by incorporating the overnight rule into the withholding regulations which it drafted only a few years later in 1943.[12] *See*, *supra*, pp. 4-5.

---

[12] In the Company's opening brief, it is observed that "[i]n 1963, not one regulation, revenue ruling, or judicial decision required withholding on any travel expense reimbursements." Br. 30. The government disputes this statement solely on the basis that its overnight rule was outstanding in 1963. Gov't. Br. 33. But the government utterly fails to show any official announcement by it which would have informed employers that the overnight rule had any relevance to withholding.

B. Judicial Authority In 1963 Held That Employees Were Entitled To An Offsetting Income Tax Deduction

In fact, in 1963 it was not even clear that meal reimbursements were taxable income to employees (because of offsetting deductions), much less "wages." *See* Br. 31-32 and cases cited therein. This question was not answered until four years later, in this Court's decision in *United States* v. *Correll*, 389 U.S. 299 (1967), which turned on administrative convenience rather than a literal interpretation of the statutory language. The result in *Correll* was not clearly foreshadowed; indeed, it overruled decisions in *Hanson* v. *Commissioner*, 298 F.2d 391 (8th Cir. 1962), *Chandler* v. *Commissioner*, 226 F.2d 467 (1st Cir. 1955), and *Scott* v. *Kelm*, 110 F.Supp. 819 (D. Minn. 1953), all of which were outstanding in 1963.[13] Courts continued to reject the "overnight rule" after 1963. *See Correll* v. *United States*, 369 F.2d 86 (6th Cir. 1966), *rev'd*, 389 U.S. 299 (1967); *William A. Bagley*, 46 T.C. 176 (1966); *Ahrens* v. *United States*, 264 F.Supp. 518 (S.D. Ill. 1967).

C. Employers Have A Right To Be Told In Advance Of Any Changes In Long-Standing Withholding Policy

The government suggests that:

> [P]etitioner easily could have protected itself from the risk of having to pay the tax by seeking a ruling from the Commissioner as to whether the meal allowances were wages subject to withholding.

Gov't. Br. 35.

But it is absurd to place the burden on employers to protect themselves from unannounced changes in government withholding policy. Under the withholding system employers are agents of the government for the collection of the revenue. As such, the government owes them the duty to inform them *in advance* of fundamental changes in their withholding obligations. Moreover, as Congress has recognized, the exigencies of time and the momentum of the payroll collection process demand that employers be able to rely on administrative practice.[14] Employers cannot postpone weekly or monthly withholding decisions while they wait for a ruling from Washington, which may or may not be forthcoming.

The crowning irony of the government's suggestion that the Company should have foreseen a withholding requirement in 1963 is that, fourteen years later, the government itself apparently does not withhold on similar reimbursements. Br. 23-24, n.18.

---

[13] The government suggests that "the courts that had rejected the overnight rule proposed other tests for deductibility that petitioner's employees would have failed to meet." Gov't. Br. 23. There is no basis for this assertion. In fact, based on these cases, one of the Company's employees was allowed a deduction for noon meal reimbursements of the exact type here in issue. *See Ahrens, infra.*

[14] *See* Statements of the Chairman and ranking member of the Senate Finance Committee, 122 Cong. Rec. S12,496 (Daily ed. July 26, 1976), adopted by reference by the Conference Committee for the Tax Reform Act of 1976, S.Rep. No. 1236, 94th Cong., 2d Sess. 489, *reprinted* in 1976-3 Cum. Bull. 807, 893. The senators emphasize that Congress deplores retroactive enforcement by the Internal Revenue Service of changed rules in the withholding tax area. *See also* Br. 27.

CONCLUSION

For the reasons stated in Petitioner's Briefs the judgment of the Court of Appeals should be reversed. Petitioner also requests a remand to the district court for the award of attorneys' fees pursuant to 42 U.S.C. §1988 (1976).

Respectfully submitted,

SHARON L. KING
One First National Plaza
Suite 4200
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:
ROBERT E. CRONIN
GERALD D. MINDELL
THOMAS G. RYAN
PHILIP P. STEPTOE
ISHAM, LINCOLN & BEALE